No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

—v.—

SPRAY-RITE SERVICE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE BURLINGTON COAT FACTORY WAREHOUSE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF SPRAY-RITE SERVICE CORPORATION

HERBERT S. KASSNER
(Counsel of Record)

KASSNER, HAIGNEY & THOMSON
122 East 42 Street
Suite 2117
New York, New York 10168
(212) 557-3755

On Behalf of *Amicus Curiae*
Burlington Coat Factory
Warehouse Corporation

QUESTION PRESENTED

Whether this Court should reach out to abandon 70 years of established policy that has deemed resale price maintenance agreements per se illegal under Section 1 of the Sherman Act 15 U.S.C. Section 1.[1]

---

(1) The Burlington Coat Factory Warehouse Corporation does not deal in this brief with the Court's resolution of the two primary questions with which the Court is properly faced and for resolutions of which the Court granted certiorari. However, it is submitted that the Seventh Circuit's decision was essentially correct and should be affirmed.

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Interest of the Burlinton Coat Factory Warehouse Corporation. 2

Statement. 4

Summary of Argument. 6

I. The Question of Whether Vertical Price Fixing Should Remain a Per Se Violation of the Antitrust Laws Should Not be Reached 7

II. Any Reevaluation by this Court of the Standards Governing Vertical Price Restraints Should Result in the Reassertion of the Per Se Rule . . 12

Conclusion 18

TABLE OF AUTHORITIES

CASES

Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) 12, 15

Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 273 (1911) 10

FTC v. Beech-Nut Packing Co., 362 U.S. 29 (1922) 10

Jefferson Country Pharmaceutical Ass'n v. Abbot Laboratories, 103 S.Ct. 1011, 1063 (1983). 11

Reiter v. Sonotone, 442 U.S. 330 (1979). . 14

United States v. Park, Davis & Co., 362 U.S. 29 (1960) 10

Legislative History

H.R. Rep. No. 94-341, 94th Cong., 1st Sess. (1975) 16-17

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-914

MONSANTO COMPANY, PETITIONER

v.

SPRAY-RITE SERVICE CORPORATION, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE BURLINGTON COAT FACTORY WAREHOUSE CORPORATION AS AMICUS CURIAE

This brief is filed on behalf of the

Burlington Coat Factory Warehouse Corporation

in support of Respondent. Consent from counsel for both parties is to be filed simultaneously with the Clerk of this Court.

INTEREST OF THE BURLINGTON COAT FACTORY WAREHOUSE CORPORATION

Through its wholly-owned subsidiaries, Burlington Coat Factory Warehouse Corporation ("Burlington") operates a chain of "off-price" clothing stores with more than thirty locations throughout the Eastern, Southern and Midwestern portions of the United States. Burlington's business has prospered because of its ability to sell full lines of first quality men's and women's clothing at prices that are generally twenty-five (25%) percent below the retail prices charged by most large

department stores which are its principal competitors.

Burlington is interested in the outcome of this action because any retreat from this Court's view that retail price maintenance is a per se violation of the Sherman Antitrust Act would have a devastating impact upon its business. Burlington's entire marketing strategy depends upon its ability to engage in vigorous price competition at the retail level. Over the years, certain manufacturers have informed Burlington that its low pricing policies have caused dissatisfaction among Burlington's competitors. Some such manufacturers have, from time to time, requested that Burlington raise its prices to alleviate such dissatisfaction. But for the strict

antitrust policy against retail price fixing, many such manufacturers would undoubtedly have terminated sales to Burlington or forced it to adhere to high, uncompetitive prices which would do violence to Burlington's fundemental marketing philosophy.

Accordingly, Burlington and all clothing retailers which thrive on vigorous price competition have a substantial interest in the outcome of this case should the Court determine to accept the Antitrust Division's invitation to reconsider the rule that retail price maintenance constitutes a per se violation of the antitrust laws.

STATEMENT

Monsanto Company has urged reversal of

the decision in Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982) on two grounds. A third purported basis for reversal has been injected into this litigation by the Department of Justice in its brief amicus curiae, i.e., that "all vertical restrictions, including resale price maintenance, should be analyzed under the rule of reason." (Brief for the United States as Amicus Curiae at 13). It is Burlington's position that the Seventh Circuit's determination should be affirmed and that the de novo contentions of the Justice Department respecting resale price maintenance should not be considered and, if considered, should be rejected.

SUMMARY OF ARGUMENT

It is submitted that this case is an inappropriate vehicle for the Court to re-examine a fundamental rule that has been the antitrust law of the land for over seventy years. In its brief, Monsanto Company does not question the fundamental principal that vertical price fixing is a per se violation of the antitrust laws. The issue is before the Court only because of its extraordinary interjection by the Department of Justice in its amicus curiae brief. Accordingly, the issue has received no meaningful development by the respective parties or the Courts below.

It is submitted that, if there is any merit to effecting such a change in policy,

it is for Congress rather than this Court to bring it about. Congress has already evaluated vertical price fixing in repealing the "Fair Trade" statutes and, in so doing, has made clear its view that such restraints have no economic justification.

Should the suggested reevaluation by this Court take place, the Court should reassert that vertical price fixing is inherently harmful to interbrand and intrabrand competition and that there is no ecomomic justification for subjecting it to the rule of reason.

ARGUMENT

1. THE QUESTION OF WHETHER VERTICAL PRICE FIXING SHOULD REMAIN A PER SE VIOLATION OF THE ANTITRUST LAWS SHOULD NOT BE REACHED

Burlington submits that the decision of the Seventh Circuit was essentially correct and should be affirmed without referance to the vertical price fixing issue interposed by the Antitrust Division. The reasons why the Antitrust Division's invitation to reconsider long-established precedent should be declined are manifold.

A. The long-established prohibition against retail price maintenance has afforded business organizations a degree of certainty as to what conduct is and is not permissable. Subjecting such restraints to rule of reason analysis would place each component in a distribution chain in a state of doubtfulness as to the legality of its acts. Abandonment

of the per se rule would result in numerous businesses embarking on price-fixing programs in the hopes of withstanding a rule of reason challenge. Such a development would clearly result in opening a Pandora's box of complex litigation aimed at ascertaining the purpose and effect of various price-fixing arrangements. It would also place retailers and distributors in a perilous dilemma when deciding whether to purchase a given line of merchandise subject to a fixed resale price: A decision to purchase could result in antitrust litigation and liability while a decision not to buy could mean the loss of substantial business. Adherance to the present per se rule would obviate such uncertainty and permit the market place to

continue to function in an orderly manner.

B. The doctrine of stare decisis militates in favor of leaving the law in its present state. It is submitted that an unbroken string of clear holdings[2] of this Court over a period of seventy years cannot be lightly disregarded without severly undermining the principle of stare decisis.

C. It is submitted that any decision to alter the present rule respecting resale price maintenance should be left to Congress and that Congress has already signified that

---

(2) E.g., Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 273 (1911); United States v. Park, Davis & Co., 362 U.S. 29 (1960); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

it desires no change in the law.

This Court has recognized that Congress is in a better position than it to fully evaluate the ramifications of changes in anti-trust policy:

> "[I]t is 'not for [this Court] to indulge in the business of policy making in the field of anti-trust legislation . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.'" Jefferson Country Pharmaceutical Ass'n v. Abbot Laboratories, 103 S.Ct. 1011, 1063 (1983)

Indeed, Congress's view that the per se rule should remain the law may be ascertained from its long acquiescence in the rule and its approval of the rule as demonstrated by repeal of the "Fair Trade" laws:

> "Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual states." Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18 (1977).

Accordingly, the Court should decline the Antitrust Division's tacit request that this Court consider adopting a standard at odds with the implicit and expres intention of Congress.

II. ANY REEVALUATION BY THIS COURT OF THE STANDARDS GOVERNING VERTICAL PRICE RESTRAINTS SHOULD RESULT IN THE REASSERTION OF THE PER SE RULE

If the validity of the per se rule is reexamined, the Court should adhere to it.

Both intrabrand and interbrand competi-

tion will be harmed if the law is changed. It is self-evident that resale price maintenance stifles intrabrand price competition. Intrabrand competition, while of less significance than interbrand competition from an antitrust point of view, is clearly of substantial benefit to consumers and low-price retailers such as Burlington. Under present market conditions, consumers of clothing products enjoy a wide range of choice among the prices they pay for items of apparel. Burlington's prices tend to be twenty-five (25%) percent below those charged by large department store chains. This price differential has resulted in robust competition between Burlington and department stores which have often dropped their prices in an

effort to meet Burlington's challenge. The ultimate beneficiary of such free play in the market has been the consumer. Permitting clothing manufacturers to fix the resale price of their wares would inevitably eliminate such benefits. This Court has recognized that the interest of the consumer is a primary concern of antitrust enforcement:

> "It is in the sound commercial interest of retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive free enterprise system. The essence of the antitrust laws is to ensure fair price competition in an open market." Reiter v. Sonotone, 442 U.S. 330, 342 (1979).

Elimination of the per se rule would harm interbrand competition as well. The

Justice Department's position notwithstanding, this Court has already expressed the view that "[r]esale price maintenance is not only designed to, but almost invariably does, in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands." Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18 (1977).

Accordingly, the Justice Department's position that interbrand competition might somehow be fostered by abandonment of the per se rule flies in the face of this Court's contrary view.

In addition, the Justice Department's fundamental premise is that only the manufac-

turer's marketing strategies should be taken into consideration when scrutinizing the validity of the per se rule. This approach completely ignores Congress's intention as expressed in the legislative history surrounding the repeal of the "Fair Trade" laws. Such legislative history reveals that Congress intends the relevant aspects of the antitrust laws to benefit retailers and consumers as well as manufacturers:

> "Some retailers prefer to try to enlarge their share of the market by competing vigorously in price--prescisely (sic) the sort of behavior encouraged by our antitrust laws. This competition is stifled by 'fair trading'". H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3 (1975).

* * * *

> "To the extent that the 'Mom and Pop' retailer charges a higher price because he is providing more services to his customers, consumers should have the freedom to choose between paying more for these services and buying nothing but the unadorned product at a lower price from a competitor." H.R. Rep. No. 94-341, 1st Sess. 4 (1975).

Thus, the Justice Department's notion that the only purpose of the vertical aspects of the antitrust laws should be to give unbridled freedom to manufacturers contradicts the will of Congress. That branch of government has declared that the interests of retailers and consumers are protected by adherance to the per se rule and, accordingly, the Justice Department's position can only be adopted in defiance of express legislative intent.

In short, the Justice Department's approach is posited on an economic theory which is repugnant to the holdings of this Court and the views of Congress. It should therefore be rejected.

CONCLUSION

Burlington submits that the Court should affirm the determination of the Seventh Circuit without conducting a reevaluation of a legal principle which has governed the operation of our economic system for more than seventy years. If, however, the Court elects to address the question raised by the Antitrust Division, it should reaffirm its oft-stated position that vertical price restraints

constitute per se violations of the antitrust laws.

Respectfully submitted,

HERBERT S. KASSNER
(Counsel of Record)
KASSNER, HAIGNEY & THOMSON
122 East 42 Street
New York, New York 10168
(212) 557-3755

Dated: July 13, 1983